No. 14-1406

In the
Supreme Court of the United States

STATE OF NEBRASKA, ET AL.,

Petitioners,

v.

MITCH PARKER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR OMAHA TRIBAL COUNCIL RESPONDENTS

MAURICE R. JOHNSON
Attorney General
Omaha Tribe of Nebraska
100 Main Street
Macy, NE 68039

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Omaha Tribal Council Respondents

(Additional Counsel Listed on Inside Cover)

December 16, 2015

NORA M. KANE
STINSON LEONARD STREET LLP
1299 Farnam St.
Suite 1500
Omaha, NE 68102

MARK J. PETERSON
PETERSON LAW OFFICE, LLC
5201 Chicago Street
Omaha, NE 68132

PATRICIA A. ZIEG
PATRICIA A. ZIEG LAW
OFFICES, LLC
1327 South 35th Ave.
Omaha, NE 68105

QUESTION PRESENTED

This Court has repeatedly emphasized that "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). As with other legislative actions relinquishing sovereignty, the "congressional purpose" in diminishing a reservation must be "clear and plain." *South Dakota v. Yankton Sioux*, 522 U.S. 329, 343 (1998). To discern the congressional intent behind the Act of Congress alleged to work the diminishment, three factors are relevant: (1) the text of the relevant statute, which in this context, like every other, is the "most probative evidence" of congressional intent; (2) the events surrounding that statute's enactment (*i.e.*, the legislative history); and, (3) to "a lesser extent," post-enactment events and demographic trends. *Solem*, 465 U.S. at 470-72. After examining all three *Solem* factors, the Omaha Tribal Court, a federal district court, and a unanimous panel of the Eighth Circuit held that Congress did not diminish the boundaries of the Omaha Indian Reservation by the Act of August 7, 1882 ("1882 Act"), ch.434, 22 Stat. 341.

The question presented is whether Congress demonstrated a "clear and plain" intent to diminish the boundaries of the Omaha Indian Reservation by passing the 1882 Act.

PARTIES TO THE PROCEEDING

The list of Petitioners included in Petitioners' November 16, 2015 merits brief is accurate.

Respondents are Mitch Parker, in his official capacity as Chairman of the Omaha Tribal Council; Barry Webster, in his official capacity as Vice-Chairman of the Omaha Tribal Council; Amen Sheridan, in his official capacity as Treasurer of the Omaha Tribal Council; Rodney Morris, in his official capacity as Secretary of the Omaha Tribal Council; Orville Cayou, in his official capacity as Member of the Omaha Tribal Council; Eleanor Baxter, in her official capacity as Member of the Omaha Tribal Council; Ansley Griffin, in his official capacity as Member of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control (the "Omaha Tribal Council Respondents," or "Tribal Respondents"); and the United States (collectively, "Respondents"). The Tribal Respondents were defendants in the district court proceedings and appellees before the Eighth Circuit. The United States was Defendant-Intervenor before the district court and an appellee in the Eighth Circuit.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES vi
INTRODUCTION 1
STATEMENT OF THE CASE 3
A. Background on Statutory Diminishment of Indian Reservations 3
B. History of the Omaha Reservation and the 1882 Act 6
C. The Omaha Tribe's Beverage Control Ordinance and Petitioners' Complaint 9
D. The District Court's Opinion 10
E. Eighth Circuit's Opinion 14
SUMMARY OF ARGUMENT 15
ARGUMENT 22
I. The Text Of The 1882 Act Makes Clear That Congress Did Not Intend To Diminish The Omaha Reservation 22
A. Interpretation of the 1882 Act Is Guided by Three Bedrock Principles That This Court Has Repeatedly Reaffirmed 23
B. The 1882 Act Contains No Telltale Signs of Congressional Intent to Diminish 25
C. The 1882 Act Closely Resembles Other Statutes That Did Not Diminish Reservations 26

D. Congress Knew Precisely How to Diminish the Omaha Reservation Yet Chose Not to Do So in the 1882 Act 28

E. Petitioners' Brief Discussion of the Statutory Text Does Not Support a Finding of Diminishment 30

II. The 1882 Act's Legislative History And Surrounding Circumstances Indicate Congressional Intent Not To Diminish The Reservation 33

A. The Circumstances Surrounding the 1882 Act Strongly Suggest Congressional Intent Not to Diminish 34

B. The 1882 Act's Legislative History Contains Evidence That Congress Did Not Intend to Diminish 37

C. The Legislative History Cited by Petitioners Does Not Show Clear Congressional Intent to Diminish 38

III. Post-Enactment History And Demographic Trends Do Not Reflect Clear Congressional Intent To Diminish The Reservation 43

A. Use of Post-Enactment History Is Highly Disfavored and Should Be Used With Great Caution 43

B. Statutes Enacted Shortly After the 1882 Act Demonstrate Congressional Intent Not to Diminish 44

C. The "Mixed Record" of Other Post-Enactment Evidence Sheds Little Light on Congress' Intent 47

IV Finding Diminishment Based On The "Mixed Record" Of Evidence On The Third *Solem* Factor Would Produce Harmful And Anomalous Consequences 56

CONCLUSION 60

TABLE OF AUTHORITIES

Cases

Am. Tobacco v. Patterson,
456 U.S. 63 (1982) 39

Arlington Cent. Sch. Dist. v. Murphy,
548 U.S. 291 (2006) 23

Ash Sheep v. United States,
252 U.S. 159 (1920) 45

Atkinson Trading v. Shirley,
532 U.S. 645 (2001) 58

Bruesewitz v. Wyeth,
562 U.S. 223 (2011) 20, 25, 43, 46

Caraco Pharm. v. Novo Nordisk,
132 S. Ct. 1670 (2012) 23

City & Cty. of San Francisco v. Sheehan,
135 S. Ct. 1765 (2015) 48

City of Sherrill v. Oneida Indian Nation,
544 U.S. 197 (2005) 55

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 23

CPSC v. GTE Sylvania,
447 U.S. 102 (1980) 43

Cty. of Yakima v. Confederated Tribes of Yakima Indian Nation,
502 U.S. 251 (1992) 24

Dean v. United States,
556 U.S. 568 (2009) 23

DeCoteau v. Dist. Cty. Court,
420 U.S. 425 (1975) 3, 4, 25, 55

District Of Columbia v. Heller,
554 U.S. 570 (2008) 46

Duncan Energy v. Three Affiliated Tribes,
27 F.3d 1294 (8th Cir. 1994) 29

Exxon Mobil v. Allapattah Servs.,
545 U.S. 546 (2005) 33

Hagen v. Utah,
510 U.S. 399 (1994) ..... *passim*

Hartford Underwriters Ins.
v. Union Planters Bank,
530 U.S. 1 (2000) 23

Hawaii v. Office of Hawaiian Affairs,
556 U.S. 163 (2009) 16, 30

Kasten v. Saint-Gobain Performance Plastics,
563 U.S. 1 (2011) 23

Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 23

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 33, 34

Lone Wolf v. Hitchcock,
187 U.S. 553 (1903) 56

Mattz v. Arnett,
412 U.S. 481 (1973) 27, 28, 29

Michigan v. Bay Mills Indian Cmty.,
134 S. Ct. 2024 (2014) 16, 24

Mid-Con Freight Sys.
v. Mich. Pub. Serv. Comm'n,
545 U.S. 440 (2005) 34

Montana v. United States,
450 U.S. 544 (1981) 21, 58

Nev. Dep't of Human Res. v. Hibbs,
538 U.S. 721 (2003) 16, 23, 24

Oliphant v. Suquamish Indian Tribe,
435 U.S. 191 (1978) 21, 58

Osage Nation v. Irby,
597 F.3d 1117 (10th Cir. 2010) 31

Ratzlaf v. United States,
510 U.S. 135 (1994) 23

Raygor v. Regents of Univ. of Minn.,
534 U.S. 533 (2002) 24

Rice v. Rehner,
463 U.S. 713 (1983) 9

Rosebud Sioux v. Kneip,
430 U.S. 584 (1977) ..... *passim*

Sebelius v. Cloer,
133 S. Ct. 1886 (2013) 23

Seymour v. Wash. State Penitentiary,
368 U.S. 351 (1962) 28

Solem v. Bartlett,
465 U.S. 463 (1984) ..... *passim*

South Dakota v. Yankton Sioux,
522 U.S. 329 (1998) ..... *passim*

United States v. Ceccolini,
435 U.S. 268 (1978) 47

United States v. Celestine,
215 U.S. 278 (1909) 5

United States v. SCS Bus. Inst.,
173 F.3d 870 (D.C. Cir. 1999) 43

Vieth v. Jubelirer,
541 U.S. 267 (2004) 57

Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 24

Wisconsin v. Stockbridge-Munsee Cmty., 554 F.3d 657 (7th Cir. 2009) 31

Statutes

18 U.S.C. §1161 ..... 9, 58, 59

Act of June 15, 1880, 21 Stat. 199 4

Act of August 7, 1882, 22 Stat. 341 ..... i, 1, 27

Act of Aug. 2, 1886, 24 Stat. 214 45

Act of May 15, 1888, 25 Stat. 150 45

Act of Aug. 19, 1890, 26 Stat. 329 45

Act of Aug. 11, 1894, 28 Stat. 276 45

Act of May 6, 1910, 36 Stat. 348 46

General Allotment Act, 24 Stat. 388 (1887) 4

Neb. Rev. Stat. §13-1503 ..... 52, 57

Neb. Rev. Stat. §22-187 50

Rule and Regulations

Sup.Ct.R.14.1(a) 55

35 Fed. Reg. 16,598 (1970) 50

71 Fed. Reg. 10,056 (2006) 9

Other Authorities

ECF Doc. 24, *Lamplot v. Heineman*, 06-cv-3075 (D. Neb. July 20, 2006) 51

ECF Doc. 31, *Lamplot v. Heineman*, 06-cv-3075 (D. Neb. Oct. 23, 2006) 51

Nat'l Conference of State Legislatures, *Government to Government: Models of*

Cooperation Between States and Tribes (2009), *available at* perma.cc/ay6f-p9ns 52

INTRODUCTION

This Court has repeatedly emphasized that "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). As with other legislative actions relinquishing sovereignty, the "congressional purpose" in diminishing a reservation must be "clear and plain." *South Dakota v. Yankton Sioux*, 522 U.S. 329, 343 (1998). To discern the congressional intent behind the Act of Congress alleged to work the diminishment, three factors are relevant: (1) the text of the relevant statute, which in this context, like every other, is the "most probative evidence" of congressional intent; (2) the events surrounding that statute's enactment (*i.e.*, the legislative history); and, (3) to "a lesser extent," post-enactment events and demographic trends. *Solem*, 465 U.S. at 470-72. The question in this case is whether *Congress*—and not the State of Nebraska, the Village of Pender, or Pender residents—diminished the boundaries of the Omaha Reservation by passing the Act of August 7, 1882, ch.434, 22 Stat. 341, *reprinted at* Pet.App.82-88 ("1882 Act").

Applying *Solem*'s three-part test to the extensive evidentiary record in this case, the Omaha Tribal Court, a federal district court, and a unanimous panel of the Eighth Circuit all held that the 1882 Act did not diminish the Omaha Reservation. Absolutely nothing in the text of the 1882 Act supports a finding of diminishment, let alone reflects a "clear and plain" purpose to diminish. Indeed, while earlier treaties involving the Omaha used the classic formulation for diminishment, the 1882 Act uses the classic

formulation for statutes that permit settlement without diminishment and closely resembles statutes that this Court has already found *insufficient* to diminish a reservation. As the Eighth Circuit observed, "notably absent from [the 1882 Act's] language is any explicit reference to 'cession' combined with 'sum certain' payment, both of which have been found 'precisely suited to terminating reservation status.'" Pet.App.5. The courts below also found that the 1882 Act's legislative history reinforced the text and certainly contained no "unequivocal" indication of Congress' intent to diminish. *Yankton*, 522 U.S. at 351.

Since the ultimate question is whether the 1882 Act of Congress, and not subsequent events, diminished the Reservation, the clarity of the text and legislative history should be the end of the matter. Nevertheless, the courts below also dutifully considered whether any post-enactment evidence shed light on Congress' intent in 1882. Several subsequent statutes passed by Congress regarding the Omaha Reservation "suggest[ed] that the opened area remained a part of the reservation." Pet.App.71. Surely, to the extent any post-enactment developments are probative of the 1882 Congress' intent, it is these subsequent acts of Congress itself. The courts also considered post-enactment evidence concerning the actions of others—such as state officials and mapmakers—and found it "mixed." Pet.App.72, 76. The courts below thus unanimously concluded that there was little evidence, much less "substantial and compelling evidence," *Solem*, 465 U.S. at 472, that Congress diminished the Omaha Reservation in 1882.

Despite a Petition that promised engagement on broader legal questions, Petitioners' brief is confined to disputing the factual and legal determinations of all four federal judges to consider this factbound question below. Having conceded the all-important first *Solem* factor in the courts below, Petitioners relegate discussion of the text to page 47 of a 52-page brief, preferring instead to cherry-pick snippets of post-enactment history and demographic trends. This Court should reject Petitioners' ad hoc and unworkable approach to diminishment, which is flatly inconsistent with basic principles of statutory interpretation and general norms against the inadvertent displacement of sovereign authority. Unless the background principle that courts are to "resolve any ambiguities in favor of the Indians," *Yankton*, 522 U.S. at 344, is to be replaced with one that ordinary rules of statutory interpretation and sovereign authority do not apply to protect Tribes, this Court should affirm.

STATEMENT OF THE CASE

A. Background on Statutory Diminishment of Indian Reservations

1. "In the latter half of the nineteenth century, large sections of the Western States and Territories were set aside for Indian reservations." *Solem*, 465 U.S. at 466. But as the century progressed, many Indian communities, including the Omaha, "developed an increasing need for cash and direct assistance." *DeCoteau v. Dist. Cty. Court*, 420 U.S. 425, 431 (1975); *see* J.A.883-84.

In response to these financial pressures, many tribes, including the Omaha, agreed in treaties to

"cede" discrete sections of their lands to the United States for fixed sums of money that would support ongoing tribal needs. This "cession," or "relinquishment," of tribal lands is commonly referred to as "diminishment." Diminishment occurs when a statute "freed [Indian] land of its reservation status." *Hagen v. Utah*, 510 U.S. 399, 409 (1994). When diminishment occurs, "the States have jurisdiction over unallotted opened lands." *Solem*, 465 U.S. at 467 But diminishment does not occur when the relevant treaty or statute "simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Yankton*, 522 U.S. at 343.

In the last two decades of the nineteenth century, Congress began to shift its approach toward Indian lands. Instead of requiring tribes to give up entire swaths of their reservations for a sum-certain, Congress began to "allot" certain parcels of reservation land to Indians and then sell the remaining "surplus" lands to settlers. For example, in the early 1880s, Congress enacted several statutes that allotted land to tribal members and provided for non-Indian settlement on "surplus" lands on the reservations. *See, e.g.*, Act of June 15, 1880, 21 Stat. 199. And in 1887, Congress generalized this approach by passing the General Allotment Act ("Dawes Act"), 24 Stat. 388 (1887), which was its most significant allotment effort. The Dawes Act "empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432.

2. The "modern legacy" of the surplus land acts has been "a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the Acts and have since passed out of Indian ownership." *Solem*, 465 U.S. at 467. In cases spanning more than a half-century, this Court has articulated "a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 470.

The "first and governing principle" of diminishment is that "only Congress can divest a reservation of its land and diminish its boundaries." *Id.* Thus, "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom *by Congress*." *United States v. Celestine*, 215 U.S. 278, 285 (1909) (emphasis added). "The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud Sioux v. Kneip*, 430 U.S. 584, 586-87 (1977).

The "touchstone" in the diminishment analysis is "congressional purpose," and a purpose to diminish must be "clear and plain." *Yankton*, 522 U.S. at 343. Consistent with that demand for a "clear and plain" purpose to find diminishment, courts must begin with a "presumption that Congress did not intend to diminish the Reservation." *Solem*, 465 U.S. at 481. That presumption may then be overcome only by

"substantial and compelling evidence of a congressional intention to diminish." *Id.* at 472.

This Court has identified three factors that shed light on congressional intent. First, the "most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen*, 510 U.S. at 411. Second, courts should "consider[] 'the historical context surrounding the passage of the surplus land Acts.'" *Id.* Finally, "to a lesser extent," courts should examine "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton*, 522 U.S. at 344. Throughout this inquiry, courts are to "resolve any ambiguities in favor of the Indians, and ... not lightly find diminishment." *Id.*

B. History of the Omaha Reservation and the 1882 Act

In the early 1800s, the Omaha Tribe exercised sovereign dominion over large sections of land in present-day eastern Nebraska. J.A.878. As the nineteenth century progressed, the Tribe faced serious financial difficulties and threats from neighboring tribes. J.A.883-84. Desperate for additional funds and seeking the federal government's protection, by the early 1850s, the Tribe wished to sell large portions of its land and cede control over those lands in exchange for a reservation over which the Tribe could maintain sovereign control. J.A.883-85.

In 1854, the Omaha Tribe entered into a treaty with the United States "reserv[ing]" land for the Tribe's "future home." J.A.1020. Using the classic language of diminishment, the Tribe agreed to "cede" to the United States "all claims" to the remaining

portion of its lands in exchange for a fixed sum of $840,000. J.A.1020-23. The Omaha "forever relinquish[ed] all right and title to the country south of" the specified boundary. J.A.1020. The remaining 300,000 acres of land in northeast Nebraska, which indisputably includes present-day Pender, were designated as the Omaha Indian Reservation.

In 1865, the Omaha again agreed to "cede, sell, and convey" to the United States another 98,000 acres in the northern part of the Reservation, J.A.1015, so that the federal government could create a reservation for the Winnebago Tribe, which had been displaced from its traditional lands in Wisconsin, J.A.1018; J.A.892. In exchange for its land, the Omaha Tribe received the fixed sum of $50,000 and certain other promises from the federal government. J.A.1015-16. Pender is not located in the 98,000-acre tract that was sold in 1865.

In 1872, Congress authorized the Secretary of the Interior to survey, appraise, and sell up to 50,000 acres on the western side of the Reservation. *See* J.A.631-32. The proceeds from any sales would be deposited into the U.S. Treasury for the Omaha's benefit. J.A.632. Unlike the 1854 and 1865 Treaties, the 1872 Act did not include any language suggesting that the Omaha had agreed to "cede" the land to the United States for a sum-certain. The 1872 Act was unsuccessful, resulting in the sale of only 300 acres.

Because the 1872 Act was unsuccessful, Congress made another attempt several years later to authorize the sale of lands on the western portion of what Congress recognized remained the Omaha Reservation despite the 1872 Act. In 1882, Congress

once again authorized the Secretary of the Interior to survey, appraise, and sell roughly 50,000 acres on the western side of the Reservation. Pet.App.82. The area opened up for allotment was west of a recently established railroad right-of-way granted by the Tribe. The reaction to the 1882 Act was far more enthusiastic than to the 1872 Act; the 1882 Act resulted in the sale of large portions of the 50,000 acres on the western side of the Reservation.

Although the reaction was different, the text of the 1882 Act was broadly similar to the 1872 Act (which Petitioners never allege to have diminished the Reservation). Under both statutes, the proceeds from any land sales would be deposited into the U.S. Treasury for the Tribe's benefit. And both the 1872 and 1882 Acts—unlike the 1854 and 1865 Treaties—did not include any language suggesting that the Tribe had agreed to "cede" or "relinquish" land to the United States for a sum-certain.

There were, however, two key differences between the 1872 and 1882 Acts, both of which make it less plausible that the 1882 Act diminished the Omaha Reservation. First, the 1882 Act did not contain language from the 1872 Act stating that the land was being "separated from the remaining portion of said reservation." J.A.631. Second, the Omaha Tribe had the right to select allotments in the 50,000-acre opened area, and some tribal members did just that, a clear indication that the land remained part of the Reservation.

C. The Omaha Tribe's Beverage Control Ordinance and Petitioners' Complaint

Congress has authorized tribes to permit liquor transactions in Indian country only if those tribes enact an ordinance that is certified by the Secretary of the Interior, published in the Federal Register, and conforms to "the laws of the State in which" the transaction occurs. 18 U.S.C. §1161. Section 1161, which replaced a blanket federal prohibition on liquor transactions in Indian country, gives joint authority to states and tribes to regulate alcohol sales on reservations. *See Rice v. Rehner*, 463 U.S. 713, 726 (1983).

This case arises out of the Omaha Tribe's efforts to enforce its Beverage Control Ordinance and impose a 10% tax on the sale of alcohol from any licensee on tribal land. Pet.App.16. The Omaha enacted the ordinance in 2004, and the Secretary of the Interior approved it in 2006. *See* 71 Fed. Reg. 10,056 (2006). After the Omaha attempted to enforce the Beverage Control Ordinance against several businesses and clubs that sell alcohol in Pender, the Individual Petitioners—owners or agents of those establishments—brought this suit against the members of the Omaha Tribal Council. The Individual Petitioners sought prospective injunctive relief barring the Tribe from enforcing the Ordinance against them.

On October 4, 2007, the district court stayed the original proceeding so that Petitioners could exhaust their remedies in Omaha Tribal Court. Pet.App.18-19. The Omaha Tribal Court determined on February 4, 2013 that Congress did not "intend[] to diminish the

boundaries of the Omaha Indian Reservation" in the 1882 Act. J.A.137

The case then returned to federal court, and the State of Nebraska intervened, requesting a sweeping permanent injunction prohibiting the Omaha Tribe from asserting jurisdiction within any of the 50,157 acres of Thurston County west of the railroad right-of-way. The United States also intervened, arguing that the 1882 Act did not diminish the Omaha Reservation.

D. The District Court's Opinion

On February 13, 2014, the district court granted summary judgment to Respondents, holding based on an expansive factual record that Petitioners failed to show that Congress clearly intended to diminish the Omaha Reservation through the 1882 Act. Pet.App.77

1. Petitioners conceded below that "the most probative factor to be examined in a diminishment inquiry—statutory language—does not work in their favor." Pet.App.56; *see* D.Ct.Dkt.118, at 41 (conceding that "the express language of the 1882 Act does not incorporate terms which the [Supreme] Court has previously determined to be clear evidence of Congressional intent to diminish").

Despite that concession, the district court carefully examined the text of the 1882 Act. While recognizing that this Court has "never required any particular form of words before finding diminishment," Pet.App.56, the district court noted that the 1882 Act contained *none* of the telltale indicia of diminishment. For example, the Act did "not provide for cession, relinquishment, conveyance, or surrender of all rights, title, or interest to the Omaha

Tribe's land in exchange for a specific sum of money," nor did it "restore lands to the public domain" or "require the Tribe to vacate their reservation land." Pet.App.57 Instead, the 1882 Act simply provided for the survey. appraisal, and sale of lands for settlement, and proceeds from any sales were placed in trust for the Tribe's benefit. *Id.* The 1882 Act allowed Tribe members to select allotments both east and west of the railroad right-of-way, "suggesting that Congress intended the land west of the right-of-way to remain part of the Omaha Reservation." *Id.*

The district court found the textual differences between the 1882 Act and the 1854 and 1865 Omaha Treaties "particularly illuminating." Pet.App.58. In the 1854 and 1865 Treaties—unlike the 1882 Act—the Omaha expressly agreed to "cede, sell, and convey" land to the United States and "relinquish ... all claims" in exchange for a sum-certain. J.A.1015, 1020-21. These differences in statutory language "demonstrat[ed] that both Congress and the Tribe knew how to alter the reservation boundaries when they chose to do so." Pet.App.58.

2. The court next turned to the 1882 Act's legislative history and surrounding circumstances, noting that evidence of diminishment derived from those sources must be "unequivocal." Pet.App.62. The district court found the legislative history to be far from "unequivocal." As the court explained, "the only thing that can be said with certainty is that Congress understood that the stated purpose of the legislation at issue was 'to sell this land and get it into cultivation, and the object of the Indians is to get the money and have it put in trust for them here in

Washington where they can draw their interest.'" Pet.App.63.

Petitioners had cited assorted statements from the 1870s and early 1880s suggesting a desire to "separate" the 50,000 acres of land west of the right-of-way. But the district court found those references unpersuasive because "if use of the word 'separate' ... [has] any legal relevance, then equally significant is Congress's decision to *remove* the word ... from the 1882 Act at issue here." Pet.App.67 (emphasis added). Nor was the court persuaded by two "isolated statements" by the Commissioner of Indian Affairs, who (nearly a decade before the 1882 Act was enacted) had referred to "diminishing these reservations" and a "diminished reserve." *Id.*, *see* J.A.194, 360-61, 504, 625. The district court concluded that these statements "carry little weight" because "even direct, contemporaneous congressional language 'scattered through the legislative history' referring to 'reduced reservation[s]' or 'reservations as diminished' is ambiguous for purposes of diminishment analysis." Pet.App.67 (quoting *Solem*, 465 U.S. at 478).

The district court was thus unable to conclude that Congress "clearly contemplated" that the Reservation would be diminished by the 1882 Act. Pet.App.65. The court found no "specific discussion of how, if at all, the 1882 Act would impact Omaha Reservation boundaries or whether the Act would transfer ... tribal sovereignty." *Id.* Accordingly, the court determined, "[t]he legislative history leading up to the passage of the 1882 Act is insufficient to establish an 'unequivocal,' widely held, contemporaneous understanding that the 1882 Act

would diminish" the Reservation, "as opposed to merely authorize the sale of reservation land to non-Indian settlers for the Omaha Tribe's benefit...." *Id.*

3. This Court has held that "[w]hen both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish," courts are "bound by [their] traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Solem*, 465 U.S. at 472. The text and legislative history alone thus provided ample basis to reject Petitioners' claims. Nevertheless, because "courts are to consider all three [*Solem*] factors," Pet.App.68-69, the district court also analyzed post-enactment history and demographic trends, *see* Pet.App.69-76.

The court began with subsequent congressional enactments that extended the payment period for settlers who purchased lands on the Reservation. These extensions, which Congress passed in 1885, 1886, 1888, 1890, and 1894, "continued to reference the disputed area as the 'Omaha Indian Reservation' and 'Omaha lands,'" which "suggest[ed] that the opened area remained a part of the reservation." Pet.App.35, 70-71. Moreover, the 1888 Act "hint[ed] that diminishment did not occur" because "the United States merely continued to act as trustee for the Tribe so the Tribe gained the financial benefit of the sale." Pet.App.71-72. Congress also conditioned some extensions on the Tribe's consent, further "suggesting the continued reservation status of the disputed lands." Pet.App.72.

Turning to other post-enactment evidence, the district court noted that "the Omaha Reservation has

been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States." *Id.* This "mixed record," the court determined, "fails to reveal a consistent or dominant approach to the territory at issue[,] is 'of limited interpretive value,' carries 'little force,' and cannot be considered dispositive of the question whether Congress intended to diminish the Omaha Reservation in the 1882 Act." *Id.*

The district court also concluded that the "'mixed' evidence regarding the demographics of the area west of the right-of-way is not dispositive." Pet.App.76. The court recognized that demographic trends are the "least compelling" consideration under *Solem* because "'[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the "Indian character" of the reservation, yet ... not every surplus land Act diminished the affected reservation.'" Pet.App.74 (quoting *Yankton*, 522 U.S. at 356). And the court was not persuaded that demographic trends trumped the absence of other evidence of diminishment because the parties "agree[d] that 'many' members of the Omaha Tribe have regularly visited, resided in, and conducted business in Pender." Pet.App.75. This "[c]ommunity involvement" by the Tribe's members "suggests their understanding that Pender sits within reservation boundaries." *Id.*

E. Eighth Circuit's Opinion

The Eighth Circuit unanimously affirmed in an opinion by Judge Beam joined by Judges Loken and Colloton. The court observed that "notably absent" from the text of the 1882 Act is "any explicit reference to 'cession' combined with 'sum certain' payment, both

of which have been found 'precisely suited to terminating reservation status.'" Pet.App.5 (quoting *Yankton*, 522 U.S. at 344). The court also agreed with the district court that the text of the 1882 Act "indicates that the United States intended to act as the Omaha Tribe's sales agent ... with the proceeds held in trust in the United States Treasury for the benefit of members of the Omaha Tribe." Pet.App.6.

Turning to the second and third *Solem* factors, and after de novo review of the record, the Eighth Circuit concluded that "the district court has thoroughly, thoughtfully, and accurately considered the evidence in light of the guideposts" established by this Court. *Id.* The court added that the district court "carefully reviewed the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends, and did so in such a fashion that any additional analysis would only be unnecessary surplus." Pet.App.7

The Eighth Circuit subsequently denied Petitioners' request for rehearing en banc. Not a single judge voted to grant rehearing.

SUMMARY OF ARGUMENT

This Court has repeatedly held that "only Congress can divest a reservation of its land and diminish its boundaries," *Solem*, 465 U.S. at 470, and that courts should accordingly not find diminishment absent "clear and plain" evidence of congressional intent to diminish, *Yankton*, 522 U.S. at 343. The Omaha Tribal Court, a federal district court, and a unanimous panel of the Eighth Circuit concluded based on an extensive evidentiary record that the

demanding standard for diminishment is not satisfied here because there is no clear evidence that Congress intended to diminish the Omaha Reservation by passing the 1882 Act. The text and context of the 1882 Act strongly suggest that Congress did *not* intend to diminish the Reservation, and the post-enactment history is "mixed." Relying on such "mixed" post-enactment history to find a clear purpose to diminish in the face of the statutory text would disregard ordinary rules of statutory construction and sovereignty Petitioners' diminishment claim should thus be rejected under a straightforward application of existing law.

I. This Court's interpretation of the 1882 Act should be guided by three fundamental principles. First, when interpreting a statute, this Court "begin[s], as always, with the text." *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 173 (2009). Second, absent clear indication from Congress, this Court will not dispossess any sovereign of its authority or territory. *See, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031-32 (2014). Third, when interpreting statutes involving tribes, this Court will "resolve any ambiguities in favor of the Indians." *Yankton*, 522 U.S. at 344. All three of these bedrock interpretive principles cut against a finding of diminishment, but only the first two are necessary to reject Petitioners' extraordinary request for diminishment without textual support. Indeed, to find diminishment here would require the Court to invert the Indian canons and disregard principles of statutory construction and sovereign authority applicable in every other context. There is simply no

basis for finding clear indication of congressional intent to diminish a Tribe's sovereign territory based on "post-enactment legislative history" that in other contexts would be dismissed as an oxymoron.

In the diminishment analysis—as with any question of statutory interpretation—the statutory text is the "most probative evidence" of congressional intent. *Solem*, 465 U.S. at 470. The text of the 1882 Act contains *none* of the indicia of a congressional intent to diminish that this Court has recognized in previous cases. For example, the Act does not mention "cession," "relinquishment," or "surrender" of the lands, nor does it indicate any intent to restore the Reservation to the "public domain" or provide a sum-certain directly from the government in exchange for the relinquishment of the Reservation. Instead, the 1882 Act's operative statutory language—which merely authorizes the United States to serve as the Omaha's "sales agent" for certain lands—is virtually identical to language that this Court has found to be *insufficient* to support a finding of diminishment. *Solem*, 465 U.S. at 473. And the 1882 Act specifically provided for members of the Omaha Tribe to claim allotments on the western portion of the land, which is flatly inconsistent with congressional intent to diminish the Reservation.

Congress' intent not to diminish the Omaha Reservation is underscored by the contrast between the 1882 Act and the text of earlier treaties and statutes involving that very same Reservation. The 1854 and 1865 Treaties used the classic language of diminishment by specifically indicating that the Omaha would "cede" portions of their land for a sum-

certain. The text of the 1882 Act, by contrast, employs the classic language of legislation that opens up reservation land for settlement without diminishing the reservation. Both Congress and the Omaha plainly knew the difference. What is more, the 1872 Act—which even Petitioners acknowledge did not diminish the Reservation—was largely similar to the 1882 Act, and the two principal differences contradict an intent to diminish. Thus, if the 1872 Act did not diminish the Reservation, it follows *a fortiori* that the 1882 Act did not.

Given the overwhelming textual evidence against a finding of diminishment, it is no surprise that Petitioners conceded the first *Solem* factor below and give the statutory text only a passing mention at the very end of their brief. Thus, the "most probative evidence" of congressional intent—intent that must be clear, lest sovereignty be inadvertently surrendered—cuts firmly in favor of finding that the Omaha Reservation remains intact.

II. Legislative history and surrounding circumstances are relevant to the diminishment inquiry, but such evidence must be "unequivocal" to support a finding of diminishment. *Yankton*, 522 U.S. at 351. The circumstances leading to the 1882 Act's passage confirm what the plain language of the statute makes clear: the 1882 Act was not intended to diminish the Reservation. None of the scraps of legislative history that Petitioners highlight comes close to supplying "unequivocal" evidence of diminishment or countering the clarity of the text and historical context. Indeed, the premise of Petitioners' first question presented is that the legislative history

is, at best, "ambiguous." Pet.Br.i. Ambiguous evidence, by definition, is neither "unequivocal" nor "clear and plain."

Taken together, the evidence on the first two *Solem* factors here is sufficient to support the judgment below. "When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," courts are "bound by [their] traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Solem*, 465 U.S. at 472. Moreover, to the extent this Court looks for evidence that Congress' intent to diminish is "clear and plain," post-enactment developments do not suffice to provide a clear indication absent in both the text and traditional legislative history.

III. Even though there was no clear evidence of diminishment in either the text or legislative history of the 1882 Act, the courts below dutifully considered whether any *post-enactment* evidence shed meaningful light on Congress' intent. The district court found that the "mixed record" fell far short of the "substantial and compelling evidence" needed to demonstrate intent to diminish, and the Eighth Circuit unanimously affirmed based on its independent review of the record.

Petitioners' near-exclusive reliance on post-enactment history is at war with the "two-court rule" and this Court's half-century-old "fairly clean analytical structure" for assessing diminishment. *Id.* at 470. This Court's diminishment cases suggest only a supporting role for such evidence. *Id.* at 471. And outside this context, this Court's cases suggest such

"evidence" should play no role at all: "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth*, 562 U.S. 223, 242 (2011). Whatever the role for such evidence when the first two *Solem* factors point in opposite directions, such evidence alone should not be the basis for finding diminishment, lest both the requirement that Congress' intent be "clear and plain" and this Court's repeated warning to "resolve any ambiguities in favor of the Indians" be turned entirely upside down. *Yankton*, 522 U.S. at 343-44.

To the extent that any post-enactment evidence could materially aid an inquiry into *Congress'* intent, it would come from congressional actions roughly contemporaneous with the 1882 Act. Several statutes enacted shortly after the 1882 Act "suggest that the opened area remained a part of the reservation." Pet.App.71. The remaining post-enactment evidence, mainly emanating from non-congressional actors, is "mixed," as the lower courts correctly found. Pet.App.72, 76. At most, Petitioners cherry-pick snippets of post-enactment history and demographic trends that support their position. But Petitioners simply ignore substantial post-enactment evidence showing that both the United States and Nebraska continued to treat the disputed area as part of the Reservation. The finding of two lower courts that the post-enactment historical record was "mixed" is well-supported by the evidence and should be entitled to great deference on appeal. That mixed record cannot possibly negate Congress' express enactments defining the Reservation's boundaries.

IV. Petitioners' position—which focuses on factors far afield from congressional intent—also risks producing harmful consequences to tribes and their neighboring communities. The ad hoc diminishment inquiry Petitioners advocate encroaches on Congress' plenary power to define the boundaries of Indian reservations. Moreover, finding diminishment based on demographic trends and the sharing of jurisdiction among tribal, state, and local authorities undermines any potential for cooperation between tribes and non-Indian communities, and risks destabilizing the status of Indian lands. Nor are there judicially discernible and manageable standards to govern this inherently ad hoc inquiry. It is anyone's guess when an amorphous array of factors wholly divorced from congressional intent will "de facto diminish" congressionally-established reservation boundaries. A textually-focused inquiry that turns on what is actually in the statute books avoids that guessing game.

Petitioners drastically overstate the impact of a finding of non-diminishment. Multiple other doctrines governing Indians tribes' authority over non-Indians will fully protect the rights of non-Indians living on the Omaha Reservation. *See, e.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981). No matter how the Court decides this case or other diminishment cases, there will still be many non-Indians on tribal land who will be protected by such doctrines. In light of these well-established doctrinal tools to protect the rights of non-Indians, Petitioners' and amici's poorly-defined and inaccurate "parade of horribles" rings hollow and provides no compelling

basis to dispense with rules of statutory construction that hold sway in all other contexts or to override Congress' judgments about the Omaha Reservation's boundaries.

ARGUMENT

I. The Text Of The 1882 Act Makes Clear That Congress Did Not Intend To Diminish The Omaha Reservation.

The first *Solem* factor is "the statutory language used to open the Indian lands." *Hagen*, 510 U.S. at 411. As with every other question of statutory interpretation, the statutory text is the "most probative evidence" of congressional intent. *Id.*

The 1882 Act provided that "the Secretary of the Interior [shall] be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of [the Omaha] reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company" in 1880. Pet.App.82. The Act also authorized the appraisal of the lands west of the right-of-way. *Id.*

Before any land was sold, however, the 1882 Act permitted Omaha Tribe members to select allotments in any part of the Omaha Reservation. Specifically, the Act provided that Tribe members "may, if they shall so elect, select the land which shall be allotted to them in severalty *in any part of said reservation either east or west of said right of way.*" Pet.App.88 (emphasis added). "[U]nallotted lands" west of the railroad right-of-way were then made available for purchase and settlement by anyone, with the sale proceeds "placed to the credit of said Indians in the

Treasury of the United States." Pet.App.82-84. That is not the language of diminishment. As Petitioners correctly conceded below, absolutely nothing in this statutory text reflects a clear congressional intent to diminish the Omaha Reservation.

A. Interpretation of the 1882 Act Is Guided by Three Bedrock Principles That This Court Has Repeatedly Reaffirmed.

Three fundamental principles should guide this Court's interpretation of the 1882 Act.

First, the text of a statute is, by far, the best evidence of the enacting Congress' intent. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). It is a wholly unremarkable proposition, embraced in multitudinous contexts and in opinions of every member of the Court, that the starting point—and, in most cases, ending point—of statutory interpretation is the statutory text. *See, e.g.*, *Dean v. United States*, 556 U.S. 568, 572 (2009); *Hartford Underwriters Ins. v. Union Planters Bank*, 530 U.S. 1, 6 (2000); *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *Germain*, 503 U.S. at 253-54; *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994); *Kasten v. Saint-Gobain Performance Plastics*, 563 U.S. 1, 7 (2011); *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006); *Sebelius v. Cloer*, 133 S. Ct. 1886, 1896 (2013); *Caraco Pharm. v. Novo Nordisk*, 132 S. Ct. 1670, 1680 (2012).

Second, this Court will not lightly infer that Congress has dispossessed any sovereign of its territory or authority. *See, e.g.*, *Hibbs*, 538 U.S. at 726.

This is not some principle distinct to the tribal cases. Rather, this Court's cases are replete with requirements that Congress use clear language before abrogating sovereign immunity or imposing obligations on sovereigns. *See, e.g., id.* (Congress may not abrogate state sovereign immunity unless its intention is "unmistakably clear"); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002); *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). This Court recently reaffirmed this principle more generally in the tribal context, *see Bay Mills*, 134 S. Ct. at 2031-32, and the proposition certainly applies in the diminishment context, *see Yankton*, 522 U.S. at 344. In short, there is no "adverse possession" or inadvertent loss of sovereign authority or territory. If Congress intends to divest a sovereign of its land or authority, it must do so clearly.

Third, in the context of statutes affecting Indian tribes, this Court has applied "a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cty. of Yakima v. Confederated Tribes of Yakima Indian Nation*, 502 U.S. 251, 269 (1992). This Court has reaffirmed that principle in diminishment cases. *See Yankton*, 522 U.S. at 344 ("Throughout this inquiry, 'we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment.'"). If this canon means anything, it must mean that courts cannot use especially *disfavored* methods of statutory interpretation—such as a reliance on post-enactment evidence as an indicium of congressional intent, *see, e.g., Bruesewitz*,

562 U.S. at 242—to dispossess an Indian tribe of land that Congress expressly conferred.

B. The 1882 Act Contains No Telltale Signs of Congressional Intent to Diminish.

This Court has identified several telltale signs of diminishment. The first sign is language that indicates cession or relinquishment of, or the surrender of all rights and interests in, reservation land. *See Yankton*, 522 U.S. at 344 (diminishment found when tribe agreed to "cede, sell, relinquish, and convey" its "claim, right, title, and interest in and to" lands); *Rosebud*, 430 U.S. at 597 (diminishment found when agreement required tribe to "cede, surrender, grant, and convey" claims and interests in land). This Court has also found diminishment when a statute provides a tribe with a sum-certain from the federal government in exchange for relinquishment of land. *See DeCoteau*, 420 U.S. at 448. The combination of a reference to cession, relinquishment, or surrender and the provision of a sum-certain is the classic language of diminishment and is "'precisely suited' to terminating reservation status." *Yankton*, 522 U.S. at 344. Finally, this Court has found congressional intent to diminish based on statutory text indicating that tribal land will be "restored to the public domain." *Hagen*, 510 U.S. at 412.

As the courts below unanimously recognized, the 1882 Act contains *none* of these telltale signs of diminishment. J.A.93-100; Pet.App.57; Pet.App.5-6. There is no reference to the Tribe's cession or relinquishment of land, nor is there any suggestion that the Omaha were surrendering all claims, rights, and interests in the western portion of the

Reservation. The 1882 Act also does not provide the Tribe with a sum-certain for relinquishment of land, nor does it specify any return of the land west of the right-of-way to the public domain. Although Congress need not use any "magic words" to effect a diminishment, the absence of *any* of the classic words of diminishment in the text of the 1882 Act is powerful evidence that Congress did not intend the statute to have that effect.

C. The 1882 Act Closely Resembles Other Statutes That Did Not Diminish Reservations.

This Court has also explained what types of statutory language are *insufficient* to show diminishment. Most important, "[t]he mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud*, 430 U.S. at 586-87 That is, the opening of reservation land to settlement via sales of allotted parcels does not amount to a cessation of sovereignty over that land. *Id.* This Court has also held that language authorizing the Secretary of the Interior to "sell and dispose" of land is insufficient to indicate congressional intent to diminish. *Solem*, 465 U.S. at 472-73. And another indication of congressional intent not to diminish is provision for the deposit of proceeds resulting from a land sale "in the Treasury of the United States, to the credit of the" tribes benefitting from the sale of land. *Id.* at 473.

The 1882 Act merely authorized the Secretary of the Interior to survey, appraise, and eventually sell portions of the Omaha Tribe's lands. Pet.App.82. The

Act also provided for the creation of Indian accounts where proceeds would be held in trust for the Tribe's benefit. Pet.App.84.

Those provisions are essentially identical to the statutory text that this Court found did not give rise to diminishment in *Solem*. This Court held that the "reference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent." 465 U.S. at 473. That is precisely what Congress did in the 1882 Act. As in *Solem*, the language of the 1882 Act evinces congressional intent to have the Secretary of the Interior act as the Tribe's sales agent, not to diminish the Reservation.

Moreover, in the 1882 Act, Congress provided that Indians entitled to allotments could choose their parcels "*in any part of said reservation either east or west of said right of way.*" Pet.App.88 (emphasis added); 22 Stat. at 341. And members of the Tribe, in fact, selected allotments west of the right-of-way. Pet.App.34. Even putting aside the fact that allotment "is completely consistent with continued reservation status," *Mattz v. Arnett*, 412 U.S. 481, 497 (1973), these allotments to Indians "either east or west of said right of way" plainly suggest that the land west of the right-of-way remained every bit as much a part of the Reservation as the land east of the right-of-way, and that Congress never intended to diminish the Reservation.

D. Congress Knew Precisely How to Diminish the Omaha Reservation Yet Chose Not to Do So in the 1882 Act.

This Court has often compared the text of various congressional acts to determine whether a particular act diminished a reservation. *See, e.g.*, *Seymour v. Wash. State Penitentiary*, 368 U.S. 351, 355 (1962) (considering "important differences" between statute at issue and earlier act). Such a comparison often shows that "Congress was fully aware of the means by which termination [of reservation status] could be effected." *Mattz*, 412 U.S. at 504.

Just so here. Both the 1854 and 1865 Treaties demonstrate that Congress (and the Omaha) unquestionably knew how to diminish the Omaha Reservation when it wanted to do so. Those two treaties use the classic language of cession to indicate diminishment of the old boundaries of the Reservation. *See* J.A.1020 ("The Omaha Indians *cede to the United States* ... their lands ..., and *forever relinquish all right and title*...." (emphasis added)); J.A.1015 ("The Omaha tribe of Indians do hereby cede, sell, and convey to the United States" certain lands and "will vacate and give possession of the lands ceded by this treaty immediately after its ratification."). They likewise provide for lump-sum payments from the United States in exchange for the ceding of lands. *See* J.A.1022; J.A.1015-16.

By contrast, the 1882 Act contains no language indicating cession, relinquishment, surrender, or lump-sum payment. It would be odd to say the least if Congress used the classic language of diminishment in 1854 and 1865, yet used wholly dissimilar language

to accomplish the exact same end as to the exact same reservation a decade or two later. *See Mattz*, 412 U.S. at 504; *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1297 (8th Cir. 1994) (rejecting that "Congress intended the same meanings for the vastly different language employed in these two documents affecting the Tribe"). If words are to have meaning, then the use of vastly different textual approaches in the 1872 and 1882 Acts should produce different effects than the 1854 and 1865 Treaties.

A comparison of the text of the 1872 Act and 1882 Act also flatly refutes any finding of diminishment. Critically, no party contends that the 1872 Act worked a diminishment of the Reservation. Indeed, the text of the 1882 Act, which quite plainly refers to a "reservation" extending "east or west of said right of way" precludes any contention that the 1872 Act diminished the Reservation. But the concession concerning the 1872 Act is telling because the language employed in the two statutes is similar (and quite different from that used in the earlier Treaties).

Moreover, the two principal textual differences between the statutes make it even less plausible that the 1882 Act, but not the 1872 Act, diminished the Reservation. First, the 1872 Act contained a phrase suggesting that the western portion of the Reservation was "to be separated from the remaining portion of said reservation." J.A.631. But Congress removed that phrase in the 1882 Act. If use of this phrase "in the 1872 Act [has] any legal relevance, then equally significant is Congress's decision to remove the ... phrase from the 1882 Act." Pet.App.67 Second, the 1872 Act did not provide for Indian allotments on the

land that was being put up for sale, whereas the 1882 Act did. Thus, if the 1872 Act did not diminish the Omaha Reservation, then the 1882 Act even more clearly failed to do so.

E. Petitioners' Brief Discussion of the Statutory Text Does Not Support a Finding of Diminishment.

Petitioners finally get around to examining the single most important consideration in any statutory interpretation case on page 47 of their 52-page brief. *Cf. Hawaii*, 556 U.S. at 173 (This Court "begin[s], as always, with the text of the statute."). When they belatedly address the statutory text, Petitioners readily acknowledge that the 1882 Act does "not explicitly address[]" diminishment of the Omaha Reservation. Pet.Br.47; *see* Pet.App.56 (conceding below that "the most probative factor to be examined in a diminishment inquiry—statutory language—does not work in their favor").

Left with nothing in the statute's text to support their position, Petitioners bravely contend that Congress did not include specific language regarding diminishment because Congress anticipated that *all* reservations would eventually cease to exist. Pet.Br.46-47. But this Court has already rejected that exact argument, noting that it has "never been willing to extrapolate ... a specific congressional purpose of diminishing reservations with the passage of every surplus land Act" simply because "Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process." *Solem*, 465 U.S. at 468-69.

Petitioners cite two recent circuit court cases that supposedly found diminishment in the absence of specific words suggesting diminishment. But those two cases are readily distinguishable. In *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657 (7th Cir. 2009), the Seventh Circuit found diminishment in a statute that did not include "hallmark diminishment language," but plainly offered the tribe new land—effectively "a new reservation for the Tribe from which tribal members could select their allotments"—in exchange for ceding its traditional reservation. *Id.* at 662-63. The "clear implication" of this land swap was that "the boundaries of the new reservation were not defined by [any older] treaty, but rather by the Tribe and its acceptance of a new home." *Id.* at 663. Clearly, the statute in *Stockbridge-Munsee* was, in contrast to the 1882 Act here, "more than a run-of-the-mill allotment act," *id.*, and provides Petitioners no comfort.

Petitioners' reliance on *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), which concluded that the 1906 Osage Allotment Act disestablished the Osage Reservation, is equally misplaced. The Tenth Circuit made clear that the 1906 Act was designed to accomplish far more than allotment. "In 1905, the Osage approached Congress to begin negotiating a bill 'to abolish their tribal affairs and to get their lands and money fairly divided, among themselves.'" *Id.* at 1124. No one here contends that the Omaha had any interest in "abolish[ing] their tribal affairs," and disestablishment is not even at issue. The allotment of lands in a portion of a reservation that indisputably would continue to exist is properly evaluated as a run-

of-the-mill allotment act, and not part and parcel of an effort to wind up tribal affairs altogether.

Finally, Petitioners assert that Congress did not need to indicate diminishment in the 1882 Act because the Omaha Tribe was not physically located on the land west of the right-of-way. Pet.Br.49-51. But that argument hardly advances Petitioners' position and ignores Petitioners' burden under this Court's precedents. It is undisputed that the *entire parcel* in question was part of the Omaha Reservation at the time Congress enacted the 1882 Act. The Act itself, with its reference to "said reservation," makes this fact plain. The fact that members of the Omaha Tribe had concentrated their dwellings, as opposed to other activities, on the eastern portion of the Reservation, may explain why the western portion was targeted for allotment. But since the allotment was open to the Omaha "east or west of said right of way" (a right-of-way that was granted by the Omaha as an act of their sovereign authority over the Reservation) and included none of the telltale language of diminishment, the location of the principal Omaha dwellings does not assist Petitioners at all. It certainly does not help them as to the first *Solem* factor, and even more clearly does not carry Petitioners' actual burden, which is to show "clear and plain" evidence of congressional intent to diminish. *Yankton*, 522 U.S. at 343.

II. The 1882 Act's Legislative History And Surrounding Circumstances Indicate Congressional Intent Not To Diminish The Reservation.

This Court has held that "[e]ven in the absence of a clear expression of congressional purpose in the text of a surplus land Act, *unequivocal* evidence derived from the surrounding circumstances may support" a finding of diminishment. *Id.* at 351 (emphasis added); *but cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 287 (1994) (Scalia, J., concurring) ("If it is a 'clear statement' we are seeking, ... [n]o legislative history can [provide] that, of course, but only the text of the statute itself."). But that evidence must truly be "unequivocal" because "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil v. Allapattah Servs.*, 545 U.S. 546, 568 (2005). "Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in '"looking over a crowd and picking out your friends."'" *Id.*

This Court has thus made clear that a few isolated snippets of legislative history are insufficient to support a finding of diminishment. *See Solem*, 465 U.S. at 478. Indeed, even direct, contemporaneous language "scattered through the legislative history" referring to "reduced reservation[s]" or "reservations as diminished" is insufficient to give rise to diminishment. *Id.* "Without evidence that Congress understood itself to be entering into an agreement under which the Tribe committed itself to cede and relinquish all interests in unallotted opened lands, and in the absence of some clear statement of

congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish...." *Id.* Any other view would be antithetical to this Court's repeated assurance that Congress does not lightly or inadvertently dispossess sovereigns of their territory or authority. Only "clear and plain" evidence will do.

As both courts below recognized, Petitioners' cherry-picked statements from the legislative history of the 1882 Act fall far short of providing such "clear and plain" evidence. Indeed, the premise for Petitioners' first question presented is that the evidence concerning the second *Solem* factor is "ambiguous." Pet.Br.i. Of course, ambiguous evidence is neither "unequivocal" nor "clear and plain," and thus cannot support a finding of diminishment. *Cf. Landgraf*, 511 U.S. at 288 (Scalia, J., concurring) ("The short response to this refined and subtle argument is that refinement and subtlety are no substitute for clear statement.").

A. The Circumstances Surrounding the 1882 Act Strongly Suggest Congressional Intent Not to Diminish.

The historical context leading to the passage of the 1882 Act confirms what the text makes clear: The 1882 Act was never intended to diminish the Omaha Reservation. *See, e.g., Mid-Con Freight Sys. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 440, 449 (2005) ("Our reading of the text finds confirmation in historical context.").

The textual differences between the 1854 and 1865 Treaties and the 1872 and 1882 Acts already

highlighted were not accidental. They instead reflect differences in Congress' intent and changes in Congress' treatment of Indian lands. In approving the 1854 and 1865 Treaties, Congress expressly wanted to reduce the size of the Omaha Reservation, not just open it up to settlement. Thus, Congress provided the Omaha a sum-certain from the U.S. Treasury in exchange for large sections of undivided land. In the 1865 Treaty, for example, diminishment was unequivocally intended because the ceded land was to be used to provide reservation land to the Winnebago Tribe, which had been displaced from its native lands in Wisconsin. J.A.1018; J.A.892. The Treaties used the language of cession because that is what Congress wanted to accomplish. Congress was not content with simply allotting land to Indians or settlers, but wanted to transfer sovereignty completely and did so explicitly.

By the 1882 Act's passage, however, Congress' specific intent for the Omaha and its general approach to Indian lands had changed. As to the Omaha specifically, Congress was seeking to open a portion of "said reservation" to settlement, not trying to definitively transfer it to create a homeland for another Tribe. And more generally, by 1882, Congress was less inclined to require cession of large swaths of land in exchange for a sum-certain paid directly from the U.S. Treasury. Instead, Congress began to allot parcels of Indian land to non-Indian settlers with payments from the settlers held in trust for the Tribe, only to the extent such sales took place. Absent an express indication of an intent to diminish, these later acts did not diminish reservations or extinguish sovereignty, but gave Indian tribe members a choice:

they could either select allotments, or sell fee title to their "surplus" lands for use by non-Indian settlers. As a result, under the 1882 Act, the Omaha Tribe transferred title to, *but did not relinquish the reservation status of*, any lands that eventually happened to be sold to non-Indians.

Even apart from its text, discussed above, the 1872 Act provides important *context* for the 1882 Act. Petitioners do not contend that the 1872 Act diminished the Reservation, and for good reason. The 1882 Act opened up for sale virtually the same area as the 1872 Act, and Congress never indicated that it had already diminished the western portion of the Omaha Reservation as a result of the 1872 Act.[1] Rather, both acts permitted settlement to the extent there were successful sales, but neither Act transferred sovereignty or diminished the Reservation.[2]

That reality explains why the 1882 Act still referred to the land west of the right-of-way as part of "said reservation," a decade after the 1872 Act. Indeed, it explains how the all-important right-of-way

---

[1] While both Acts addressed the western portion of the Reservation, the Acts defined the land opened up for settlement differently. *Compare* J.A.631, *with* Pet.App.82. If either Act actually diminished the boundaries of the Omaha Reservation, this differential treatment would be quite surprising. On the other hand, if the Acts simply opened up land for settlement without changing reservation borders or displacing sovereignty, such differences are understandable.

[2] Any attempt to draw a distinction between the 1872 and 1882 Acts based on the relative success of the allotment processes ignores the fact that the "touchstone" of the diminishment inquiry is "*congressional* purpose," not market reaction. *Yankton*, 522 U.S. at 343 (emphasis added).

came to be. In April 1880, the Omaha Tribe agreed to grant the Sioux City and Nebraska Railroad a right-of-way "*through* their reservation." J.A.336 (emphasis added). No one contends that the Tribe's grant of that right-of-way was an ultra vires act of a sovereign displaced by Congress eight years earlier. To the contrary, Petitioners readily acknowledge both that it was the *Omaha Tribe*, and not Nebraska or the United States, that granted that right-of-way. and that the right-of-way ran "*through* the reservation." Pet.Br.4 (emphasis added).

Putting to one side the irony of trying to use that sovereign act of dominion (that facilitated settlement of the West) to delimit the Tribe's sovereignty, that exercise of the Tribe's sovereign authority in 1880 makes plain that the 1872 Act did not diminish the Omaha Reservation, and that the right-of-way ran *through* the Reservation, and did not somehow define the Reservation's outer boundary In light of the indisputable evidence that the 1872 Act did not diminish the Reservation, it strains credulity to think the 1882 Act addressing roughly the same portion of the Reservation and using language that is even less compatible with diminishment, *see supra* Part I.D., dispossessed the Tribe of sovereignty.

B. The 1882 Act's Legislative History Contains Evidence That Congress Did Not Intend to Diminish.

Evidence from the legislative history of the 1882 Act further confirms that Congress did *not* intend to diminish the Omaha Reservation. In particular, Congress made an effort to preserve Indian lands even west of the railroad right-of-way.

During the legislative debate, Senator Henry Dawes acknowledged that "the Omaha Indians have the whole reservation and occupy it under an existing treaty in which it is stipulated that any Indian may go upon any part of the whole reservation and occupy" land. J.A.459. In response to a suggestion that the Omaha would no longer live on the western portion of the Reservation, Senator Dawes added that "[t]here are ... quite a number of [Indians] who have gone onto some part of the reservation and made such locations, and who are entitled under existing treaties to the qualified patent; they have come to Congress praying that Congress will give them the patent." J.A.459-60. Senator Dawes further added that he wanted to "make it perfectly safe and preserve the rights of any Indian who may have located upon this land." J.A.460. Senator James Beck similarly acknowledged that the Omaha "have a right to go upon any part" of the Reservation. *Id.*

While this evidence does not speak definitively to the precise boundaries of the Omaha Reservation, it does underscore that Congress recognized that the Reservation extends east and west of the right-of-way and expressly gave tribal members the option to take land "east or west of said right of way," which cannot be squared with an intent to diminish "said reservation" or draw a new boundary at "said right of way."

C. The Legislative History Cited by Petitioners Does Not Show Clear Congressional Intent to Diminish.

Even though Petitioners bear the burden of proving diminishment by clear evidence, they engage

in the precise "cherry-picking" of isolated pieces of legislative history that this Court has repeatedly deemed insufficient in this and other contexts. *See Solem*, 465 U.S. at 478; *Am. Tobacco v. Patterson*, 456 U.S. 63, 75 (1982) ("The fragments of legislative history cited ... , regardless of how liberally they are construed, do not amount to a clearly expressed legislative intent contrary to the plain language of the statute."); *Ratzlaf*, 510 U.S. at 147-48 ("we do not resort to legislative history to cloud a statutory text that is clear").

For example, Petitioners rely on two statements by the Commissioner of Indian Affairs that refer to "diminishing these reservations" and a "diminished reserve." Those statements of an Executive-Branch official referring to a different Act (the 1872 Act) are not "legislative" history at all, but certainly exhibit all the flaws that give legislative history a bad name. First, and most obviously, the observations of an *Executive-Branch* official are a particularly poor indicium of *congressional* intent. Second, these statements are not even contemporaneous with the 1882 Act, but were made nearly a decade earlier. Third, consistent with that timing, the references pertained to the 1872 Act, not the 1882 Act, and Petitioners have never contended that the 1872 Act diminished the Reservation. And, finally, while Petitioners highlight one sentence from an 1874 report from the Commissioner, the preceding sentence indicates just as clearly that the Reservation contained 192,867 acres, including the 50,000 acres opened to settlement pursuant to the 1872 Act. *See* J.A.504 ("The Omahas are located *on a reservation* in the eastern part of Nebraska, on the Missouri River,

containing 192,867 acres...." (emphasis added)). Thus, while neither legislative, contemporaneous, nor directed at the 1882 Act, the Commissioner's own statements hardly support a finding of diminishment.

None of the other pre-enactment history cited by Petitioners speaks to the *borders* of the Reservation. For example, Petitioners cite legislative history noting that "the white men will occupy up to the railroad on the west," J.A.201, 726, and discussing the amount of space in which the Tribe would be able to farm, J.A.683. Those references might capture what some legislators envisioned would happen if the individual sales pursuant to the 1882 Act were more plentiful than those authorized by the 1872 Act, but they do not address the boundaries of the Reservation or the cessation of tribal sovereignty. The "mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud*, 430 U.S. at 586-87."[3]

Petitioners also argue that it is somehow relevant that the 1882 Act pre-dated the 1887 Dawes Act. Pet.Br.43-46. According to Petitioners, the 1882 Act is not similar to the Dawes Act or subsequent allotment acts that this Court has previously examined in the diminishment context. As Petitioners

---

[3] Petitioners also cite Senator Ingalls' observation that, under the 1882 Act, "[t]he lands that [the Tribe] occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely relinquished." J.A.647. But those remarks, too, had nothing to do with the Reservation's boundaries. Senator Ingalls was actually discussing the residual jurisdiction of the federal government to exempt Indians on the Reservation from state taxation.

recognize, the defining feature of post-Dawes Act allotments is that "individual parcels of land were allotted to tribe members with the remaining parcels declared surplus and opened for settlement by, and sale to, non-Indians." Pet.Br.44. Petitioners find it significant that the Dawes Act created a "checkerboard pattern of land ownership," which does not suggest an intent to diminish. *Id.*

But the 1882 Act was precisely the same type of allotment statute.[4] It too provided for allotments to Indians within lands that would be opened up for settlement, thereby creating the possibility of "checkerboard" Indian and non-Indian land ownership within the Omaha Reservation. Pet.App.88. The reality that most Indians subsequently took land relatively near the right-of-way that had been granted "through the reservation" or further east is not legislative history and is properly considered under the third *Solem* factor. Regardless of the pattern of settlement that ensued and whether it resembled a checkerboard or some other gameboard, the 1882 Act allowed allotments to Indians west of the right-of-way and was not materially different from the Dawes Act.

Finally, amicus Citizens Equal Rights Foundation (CERF) breathlessly claims to have found a "key piece of the legislative history" that "was missing" from the record below and "explains the intent of Congress to not only diminish the Omaha Indian reservation but to restore the lands west of the railroad right of way

---

[4] It is no surprise that the 1882 Act closely resembles the later Dawes Act given that Senator Dawes played a meaningful role in the floor debate on the 1882 Act. *See, e.g.*, Pet.App.27.

to the public domain to be sold to bona fide purchasers under the public land laws." CERF.Br.4.

Amici's claim is enough to call into question the whole enterprise of relying on legislative history to provide the kind of "clear and plain" evidence needed to displace sovereignty. After all, it hard to imagine a key piece of the statutory text could go missing. Nor is it obvious that the contours of sovereignty should depend on things not readily discernible from the statute books. But alas, the legislative history that CERF purportedly discovered was in fact before the district court and was specifically examined in the expert report prepared by the Omaha's historical expert. *See* J.A.754.

The reason that the House Report did not "end[] this suit in the federal district court," CERF.Br.22, and does not feature in Petitioners' brief, is not that it was overlooked, but that it does not advance the ball. The Report says nothing about the boundaries of the Reservation. It instead simply discusses how much land would be available for the use and occupancy of the Tribe and how much land would be opened for sale; indeed, the Tribe even had the option of claiming allotments on the lands that were to be sold. As noted, the mere sale of land to settlers does not diminish a reservation, *see Rosebud*, 430 U.S. at 586-87, and this legislative history is equally consistent with a congressional intent to sell lands *on the Omaha Reservation*.

III. Post-Enactment History And Demographic Trends Do Not Reflect Clear Congressional Intent To Diminish The Reservation.

A. Use of Post-Enactment History Is Highly Disfavored and Should Be Used With Great Caution.

In any other context, use of post-enactment legislative history—perhaps better characterized as "legislative future"?[5]—is highly disfavored to say the least. That is because such evidence is a poor indicator of congressional intent *at the time Congress acted.* "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz*, 562 U.S. at 242. Such evidence "by definition 'could have had no effect on the congressional vote.'" *Id.* And, "even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *CPSC v. GTE Sylvania*, 447 U.S. 102, 118 n.13 (1980).

Here, the ultimate question remains the intent of the Congress that enacted the 1882 Act, which is the legislation alleged to have diminished the Reservation. Thus, all of the cautions about post-enactment legislative history are fully applicable. And while the Court has allowed limited consideration of post-enactment history and subsequent demographic trends to shed light on whether an earlier Congress diminished a reservation, it has

---

[5] *See United States v. SCS Bus. Inst.*, 173 F.3d 870, 878-79 (D.C. Cir. 1999) (Silberman, J.).

repeatedly acknowledged the limits of such evidence. For example, the Court has "often observed ... that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Yankton*, 522 U.S. at 355. And, with some understatement, the Court warned that use of post-enactment history is an "unorthodox and potentially unreliable method of statutory interpretation." *Solem*, 465 U.S. at 472 n.13.

In light of the well-established limits of such post-enactment evidence, this Court has held that "[w]hen both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Id.* at 472. What in any other context would be dismissed as "a contradiction in terms" cannot be the dispositive basis for depriving a Tribe of sovereignty. Any other rule would make a mockery of both the insistence that evidence of diminishment be "clear and plain," and the canons of construction that counsel solicitude for, not discrimination against, Tribes.

B. Statutes Enacted Shortly After the 1882 Act Demonstrate Congressional Intent Not to Diminish.

If any post-enactment history has probative value in ascertaining Congress' intent in 1882, it is what Congress itself said (and did) shortly after passing the 1882 Act. In the context of the Omaha Reservation, the district court analyzed five statutes enacted between 1885 and 1894 and concluded that those

statutes were consistent with congressional intent *not* to diminish the Reservation. Pet.App.70-72.

First, these statutes repeatedly referred to the opened area as "the 'Omaha Indian Reservation' and 'Omaha lands.'" Act of Aug. 2, 1886, 24 Stat. 214; Act of May 15, 1888 ("1888 Act"), 25 Stat. 150; Act of Aug. 19, 1890, 26 Stat. 329; Act of Aug. 11, 1894 ("1894 Act"), 28 Stat. 276. This Court has viewed post-enactment statutory references to the land in question as a "reservation" as cutting against a finding of diminishment. *See Solem*, 465 U.S. at 478-79 (reference to "lands in the Cheyenne River Indian Reservation" in subsequent legislation suggested that "the opened area was still part of the reservation").

Second, the statutes passed shortly after the 1882 Act confirm that the United States continued to serve as trustee over the opened area and that sale proceeds from purchases by individual settlers were for the Tribe's benefit. *See, e.g.*, 1888 Act, §3, 25 Stat. at 151. Those facts are also consistent with the maintenance of the Reservation's boundaries. *See Ash Sheep v. United States*, 252 U.S. 159, 164-66 (1920) (distinguishing between United States' status as a tribe's trustee and its acquisition of unrestricted title to tribal lands by cession).

Third, certain post-1882 statutes required the Omaha Tribe's consent before granting payment extensions to buyers of parcels west of the right-of-way. For example, the 1894 Act stated that it "shall be of no force and effect until the consent thereto of the Omaha Indians shall be obtained." 1894 Act, 28 Stat. at 277. As with the grant of the railroad easement in 1880, this requirement of tribal consent makes little

sense if the land were no longer part of the Reservation.

Later statutes obviously shed substantially less light on the intent of the 1882 Congress, *cf. District Of Columbia v. Heller*, 554 U.S. 570, 614-16 (2008), but even later statutes that allowed Nebraska to tax Omaha lands suggest that Congress did not relinquish jurisdiction over lands both east and west of the right-of-way. In 1910, Congress enacted a statute that subjected Omaha lands allotted to Indians before 1885 to appraisal, assessment, and taxation "for local, school district, road district, county. and state purposes as provided by the laws of the State of Nebraska." J.A.962-63; Act of May 6, 1910, 36 Stat. 348, 348. This Act applied to all lands, both east and west of the right-of-way, showing that Congress believed it had jurisdiction on both sides of the Reservation. This congressional authorization of state taxation suggests that Congress had authority over the entire Reservation and simply *permitted* Nebraska to tax certain portions of it. That assertion of congressional jurisdiction is plainly inconsistent with diminishment of the Reservation in 1882.

Of course, none of this evidence is definitive as to what Congress intended in 1882 because of the limited value of post-enactment legislative "history." *See Bruesewitz*, 562 U.S. at 242. But the evidence need not be definitive for Respondents to prevail because the *party asserting diminishment* has the burden of proof and must prove diminishment by "substantial and compelling" evidence. *Solem*, 465 U.S. at 472. Congress' actions in the decades following 1882 are

flatly inconsistent with an intent to diminish the Reservation.

C. The "Mixed Record" of Other Post-Enactment Evidence Sheds Little Light on Congress' Intent.

Respondents do not dispute that, as both lower courts concluded, the post-enactment evidence in the record is "mixed." *See* Pet.Br.24-38. But the record is truly mixed, and Petitioners' brief tells only half the story, as there is significant post-enactment evidence beyond the relatively contemporaneous statutes that weighs heavily *against* a finding of diminishment.

The district court carefully examined the *entire* record and concluded that the post-enactment evidence was "mixed." This evidence "fails to reveal a consistent or dominant approach to the territory at issue," is of "'limited interpretive value,'" and "cannot be considered dispositive" of whether Congress intended to diminish the Omaha Reservation in 1882. Pet.App.72-73. Examining the same evidence *de novo*, the Eighth Circuit unanimously affirmed, concluding that "the district court has thoroughly, thoughtfully, and accurately considered the evidence in light of the guideposts provided by the Supreme Court as well as this court." Pet.App.6.

Under the "two court rule," this Court does not ordinarily review factual determinations concurred in by two lower courts. *See, e.g.*, *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). Petitioners offer no good reason to depart from that settled practice here, as the record fully supports the lower courts'

finding of a "mixed" evidentiary record on the third *Solem* factor.[6]

1. Over the past 130 years, the U.S. government has indicated many times that the 1882 Act did not diminish the Omaha Reservation. As the district court found, "[o]n January 31, 1884, eighteen months after the passage of the 1882 Land Act, federal cartographers working for the [Bureau of Indian Affairs (BIA)] drafted a map indicating that boundaries of the reservation remained the same: lands to the west of the railroad right-of-way remained part of the reservation." J.A.968, 1129. Also, "[i]n 1900, Secretary of Interior Ethan Allen Hitchcock ruled that settlers who purchased land west of the railroad right-of-way were not subject to homestead

---

[6] Having obtained certiorari on the promise of briefing a legal issue of general importance concerning the role of the third *Solem* factor when the first two factors are "ambiguous," Petitioners essentially ignore their first "question presented" in favor of a factbound argument about the Omaha Reservation that asks this Court to disregard the factual and legal findings of both federal courts and all four federal judges to consider the matter. Having secured plenary review, Petitioners' *volte face* is understandable from a tactical standpoint, as both courts below carefully considered evidence regarding all three *Solem* factors, *see* Pet.App.6-7; Pet.App.69-76; BIO at 10-11, and relying on post-enactment history alone to find a "clear and plain" indication of congressional intent when it passed the 1882 Act has nothing to recommend it. But while Petitioners' bait-and-switch serves their own interests, it is far less clear it serves this Court's interests. Because Petitioners have abandoned their first question presented, this Court might wish to dismiss the writ of certiorari as improvidently granted. *See City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015); *id.* at 1779 (Scalia, J., concurring in part, dissenting in part).

legislation because they were settled on lands 'in the Omaha reservation.'" Pet.App.36; *see also* J.A.939-40.

More recently, the United States has on multiple occasions indicated that the Omaha Reservation was not diminished by the 1882 Act. *See, e.g.*, J.A.141-44 (October 2012 letter from U.S. Attorney describing criminal jurisdiction on Omaha Reservation, including within the disputed area); J.A.1250 (April 2012 memo from Deputy Solicitor for Indian Affairs indicating that Reservation was not diminished); J.A.1135-36 (May 2007 letter indicating that Census Bureau would continue to map Pender as part of the Reservation).

Petitioners rely heavily on the U.S. government's treatment of the disputed land in the years following passage of the 1882 Act, focusing in particular on actions taken by BIA. Pet.Br.34-36. But that evidence is overshadowed by the fact that the Commissioner of Indian Affairs and other Executive-Branch officials repeatedly *frustrated* Congress' intent in their implementation of the 1882 Act. For example, those officials—particularly Commissioner of Indian Affairs Hiram Price—took actions to prevent Omaha Tribe members from exercising their statutory right to purchase allotments west of the right-of-way. *See* J.A.951 (noting "Price's efforts in dismantling Congressional intent in regard to the Omahas' right to purchase individual acreages west of the railroad right of way"). BIA's well-documented efforts to undermine the 1882 Act suggest that the agency's views about the status of that land are an especially poor indicator of the enacting Congress' intent.

2. The State of Nebraska has both expressly and implicitly acknowledged that Pender lies within the Omaha Reservation's boundaries. Since 1922, the Nebraska legislature has defined the western boundary of Thurston County as the Omaha Reservation's western boundary. Pet.App.40-41. The State's description of Thurston County maps onto the boundaries of the Omaha Reservation *pre-dating* the 1882 Act. Neb. Rev. Stat. §22-187.

Additionally, in 1969, the Nebraska legislature "retrocede[d]" to the United States "all jurisdiction over [most] offenses committed by or against Indians in the areas of Indian country located in Thurston County. Nebraska." J.A.1123. In 1970, the State's retrocession was accepted by the Interior Department, which indicated that the retroceded land was bounded by "the west boundary line of the Omaha Indian Reservation *as originally surveyed*." 35 Fed. Reg. 16,598, 16,598 (1970) (emphasis added).[7] This boundary aligns with the western boundary of the Omaha Reservation following the 1854 Treaty and includes the disputed area. More recently, the Omaha Tribe and Nebraska signed a cross-deputization agreement that permitted deputized members of both Nebraska and tribal police to make certain arrests on the tribal lands, including in Pender. Pet.App.51.

---

[7] Petitioners have argued that the language "as originally surveyed" suggests that the Reservation was diminished. But the Interior Department's notice involved *retrocession* of Nebraska's criminal jurisdiction over land in its State to the federal government. If the land in question were not part of the Reservation, there would have been no reason—and likely no basis—for retrocession.

With respect to taxation, Nebraska's tax commissioner issued a ruling in 1992 locating Pender "within the boundaries of the Omaha Indian Reservation." Pet.App.48. Furthermore, in 2005, the Omaha Tribe and Nebraska entered into a tax sharing agreement based on sales of motor fuel on the Reservation. The agreement covered lands west of the right-of-way, including Pender. When several motor fuel retailers sued Nebraska for collecting these taxes in Pender, Nebraska stated in a brief: "Plaintiffs contend that Pender is not part of the reservation. Those assertions have no factual basis." ECF Doc. 24, at 4, *Lamplot v. Heineman*, 06-cv-3075 (D. Neb. July 20, 2006). Nebraska subsequently retracted its admission, claiming to have never conceded that Pender was located within the Reservation. *Id.*, ECF Doc. 31, at 1-2 (Oct. 23, 2006). Only in February 2007 did Nebraska fully retreat from its earlier position that Pender was located within the Omaha Reservation. J.A.298. For several years after that purported retraction, Thurston County's website continued to indicate that the Omaha and Winnebago Reservations "cover the entire Thurston County area." Pet.App.42.

Petitioners attempt to draw some meaning from Nebraska's assumption of responsibility for providing certain services in Pender and other towns west of the right-of-way. Pet.Br.33-34. But the assumption of responsibilities by a state government says nothing about the continued reservation status of Indian lands. States and tribes often coordinate regarding the provision of services, with one taking responsibility for the provision of certain services in the jurisdiction of the other. "The reality is that, at

the local level in and around tribal lands, tribes, states and local governments cooperate daily and share responsibilities for government services on a broad range of issues." Nat'l Conference of State Legislatures, *Government to Government: Models of Cooperation Between States and Tribes* 3 (2009), *available at* perma.cc/ay6f-p9ns.

In fact, Nebraska law permits tribes located in the State to enter into agreements with public agencies to perform government services that any government entity is authorized to perform. Neb. Rev Stat. §13-1503. Thus, the provision of services by state and local governments on tribal lands is not at all inconsistent with the continued reservation status of those lands. Based on the *entire* factual record, Nebraska's treatment of the disputed land provides no clear and plain evidence of diminishment.

3. Demographic trends following the 1882 Act's passage also do not reflect a clear congressional intent to diminish the Reservation in 1882. This Court has held that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Solem*, 465 U.S. at 471. But this consideration is "the least compelling for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet ... not every surplus land Act diminished the affected reservation." *Yankton*, 522 U.S. at 356. When the intent of Congress was to permit settlement without diminishment, the fact of subsequent settlement in no

way counters the contemporaneous intent not to diminish.

The "de facto" diminishment inquiry discussed in *Solem* is not some free-form inquiry detached from congressional purpose. Rather, it is simply another interpretive method—the concededly "least compelling" one—for discerning congressional intent behind the act alleged to have diminished the reservation. Here, the intent of the 1882 Act and the 1882 Congress remains the focus. And the subsequent demographics of the Omaha Reservation provide no meaningful answers to the question of whether Congress intended to diminish the Reservation, and certainly do not overcome the textual and contextual factors pointing in the other direction, for several reasons.

First, as a legal matter, populations may fluctuate, but the enacting Congress' intent remains the same. The possibility that a reservation might be diminished based solely on ever-shifting demographic trends runs directly counter to this Court's repeated admonition that "only Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470. If present-day demographics of an area are sufficient to find diminishment, a reservation's status could change merely through the passage of time, in a manner that is completely unmoored from any action by Congress.[8]

---

[8] This concern is not merely hypothetical. In 1920, Indians comprised only 15% of the population of the eastern part of the Reservation. Under Petitioners' de facto diminishment test, the eastern part of the Reservation might have been deemed

Second, this is a particularly odd case for subsequent demographic trends to make an outcome-determinative difference. The 1872 and 1882 Acts share similar textual features, with the only material differences making it less likely that the 1882 Act diminished the Reservation. *See supra* Parts I.D, II.A. No one contends that the 1872 Act diminished the Reservation. While the far greater settlement that followed the 1882 Act surely demonstrates that Congress' later effort to encourage settlement was more successful, it does not demonstrate that Congress was attempting to accomplish something fundamentally different in the 1882 Act. To the contrary, when Congress wanted to accomplish something fundamentally different, it used fundamentally different language, as in the 1854 and 1865 Treaties. Subsequent demographic trends can confirm Congress' intent—as when the Winnebago replaced the Omaha on the land ceded in the 1865 Treaty—but demographic patterns alone are no substitute for congressional intent to diminish, especially where subsequent settlement is not inconsistent with Congress' intent to open land for settlement without diminishment.

In all events, the district court correctly found as a factual matter that the Omaha Tribe has played a continuous role in the western side of the Reservation, even if the western portion has a relatively high proportion of non-Indians. There have always been Indians who have lived and worked in, and engaged with, the Pender community. They have maintained

---

diminished in 1920, even though Congress unquestionably did not intend this.

a steady presence in the area, and their population has not diminished substantially since Indians selected allotments as part of the 1882 Act. J.A.204, 350.[9]

This Court has never before found diminishment based *solely* on demographic trends or non-Indians' expectations. Nor should it do so here. In all of the cases cited by Petitioners in which this Court has looked to demographic evidence, there was clear and plain evidence of diminishment in at least the text of the statute, the contemporaneous legislative history, or both, something that Petitioners readily acknowledge is not true here. *See Yankton*, 522 U.S. at 356-57; *Hagen*, 510 U.S. at 421; *Rosebud*, 430 U.S. at 604-05; *DeCoteau*, 420 U.S. at 428; *see also* Pet.Br.i (evidence as to the first two *Solem* factors is "ambiguous").[10]

---

[9] Moreover, given the Executive Branch's improper efforts to prevent Omaha Tribe members from purchasing allotments west of the right-of-way, *see supra* Part III.C; J.A.947-52, the resulting post-enactment settlement patterns are a particularly poor indicator of congressional intent.

[10] Amici the Village of Hobart and the Pender Public Schools assert that, under *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 215-16 (2005), the "longstanding assumption of jurisdiction by [a] State" may "create 'justifiable expectations'" that warrant diminishment. But, as amici concede, Petitioners neither raised this argument below nor presented it in their petition for certiorari. *See* Hobart.Br.4; Sup.Ct.R.14.1(a) (Court will consider "[o]nly the questions set out in the petition, or fairly included therein"). In all events, *Sherrill* arose in the very different context of a Tribe that was attempting to foreclose a taxation power that had long been exercised by a non-tribal city government. *See* 544 U.S. at 214-20. The Court did not address whether Congress had diminished or disestablished a reservation.

IV. Finding Diminishment Based On The "Mixed Record" Of Evidence On The Third *Solem* Factor Would Produce Harmful And Anomalous Consequences.

Petitioners' novel and unprecedented theory of diminishment is not only inconsistent with this Court's precedent, but would result in a number of deeply problematic consequences. There is no compelling reason to take that drastic step given that existing doctrine provides ample protection of the rights of non-Indians who live on reservation lands.

A. At the heart of this Court's diminishment doctrine is the basic proposition that deprivations of Indian sovereignty must come from congressional action and, like other deprivations of sovereignty, only clear congressional action will do. *Yankton*, 522 U.S. at 343. Neither subsequent settlers nor later mapmakers can do the job for Congress. Thus, adopting Petitioners' freeform theory of de facto diminishment would undercut Congress' power to determine the boundaries of Indian reservations. *See id.* ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."). Congress can easily act to diminish a reservation if it so chooses. It needs neither the Tribe's nor any State's consent. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). But precisely because the power does not depend on anyone's consent, it is critical to ensure that Congress *actually intended* to employ that sweeping power.

Courts, of course, are well-suited to discerning congressional intent from text and context. But administering a freestanding doctrine of "de facto"

diminishment unmoored from congressional intent would be a job for demographers, not jurists. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality op.) (rejecting claim where "no judicially discernible and manageable standards ... have emerged"); *id. at* 306-07 (Kennedy, J., concurring in judgment) (expressing concern about "the absence of rules to limit and confine judicial intervention").

B. Petitioners' approach also risks creating unnecessary conflict between Tribes and neighboring state and local governments. First, Petitioners' focus on the assumption of state jurisdiction over tribal lands would undercut cooperation among tribal, state, and local governments. If the rule of sovereignty becomes "use it or lose it," and the provision of services by state or local governments can "de facto" diminish a reservation, then tribes would have strong reasons not to share or consolidate services, lest that sharing or consolidation be cited against the tribe in a future diminishment proceeding. Needless to say, it is not in anyone's interest to disincentivize cooperation between tribal and non-tribal governments concerning communities located on reservations. Indeed, Nebraska's own policy encourages tribes and the State to work together to allocate responsibility for provision of various services. *See* Neb. Rev. Stat. §13-1503.

Basing a reservation's boundaries on ever-changing demographic trends, as opposed to laws fixed in the statute books, would also give tribes an incentive to keep non-Indians from locating on reservations out of fear that it would diminish the "Indian character" of their land and force them to

relitigate the previously well-defined boundaries of their reservations.

C. Finally, to the extent Petitioners are motivated by concerns over the rights of non-Indians on Indian land, their concerns are misdirected. No matter how this Court decides this diminishment case, hundreds of thousands of non-Indians will continue to live on Indian lands throughout the country, including on the eastern portion of the Omaha Reservation. Those non-Indians enjoy numerous constitutional and non-constitutional protections, and there are significant constitutional and statutory limits on tribes' authority over non-Indians. *See, e.g.*, *Oliphant*, 435 U.S. 191 (limiting tribal criminal jurisdiction); *Montana*, 450 U.S. 544 (limiting tribal civil regulatory jurisdiction over non-Indians on non-Indian fee land within reservations); *Atkinson Trading v. Shirley*, 532 U.S. 645 (2001) (limiting tribal taxation authority over non-Indian conduct on reservations). To the extent those existing protections are deemed insufficient—and Petitioners have never suggested they are—any additional protections should be achieved in a *uniform* and *generally applicable* manner, not by carving out a few thousands individuals from the Omaha Reservation on an ad hoc basis in ways the 1882 Congress never intended.

Indeed, this very case demonstrates that Congress retains an active role in protecting all interested parties. The Omaha Tribe was able to enact its Beverage Control Ordinance only pursuant to *express statutory authority* granted by Congress. *See* 18 U.S.C. §1161. And even after the Tribe adopted that ordinance, the law could not take effect until it

was certified by the Interior Department. *Id.* Section 1161 also ensures that alcohol sales in Indian country will be conducted "in conformity ... with the laws of" Nebraska. *Id.* This dual tribal-state jurisdiction over alcohol sales prevents the "parade of horribles" that Petitioners and amici allude to but never actually describe. As long as reservation boundaries are defined clearly—which would not be the case under the expansive de facto diminishment doctrine Petitioners champion—state, local, tribal, and federal officials can work cooperatively to allocate and, where appropriate, share jurisdiction.

* * *

In sum, a long line of this Court's cases reflect the principle that Acts of Congress should be construed to favor tribes and tribal sovereignty. Those cases certainly support the Omaha Tribe's position here, but there is no need to resort to them. The issue here, as in all statutory interpretation cases, is the intent of the Congress that passed the relevant statute. In every other context, that inquiry focuses on the text and, to varying degrees, the legislative history. Petitioners essentially admit that the text is against them and that the legislative history is at best ambiguous. Those concessions would be fatal in any other context, but here Petitioners face the added burden of showing a "clear and plain" intent to abrogate sovereignty. Thus, unless the Indian canons are to be flipped on their heads, the decisions of both federal courts and all four federal judges should be affirmed.

CONCLUSION

This Court should affirm the judgment of the Eighth Circuit.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

MAURICE R. JOHNSON
Attorney General
Omaha Tribe of
Nebraska
100 Main Street
Macy, NE 68039

NORA M. KANE
STINSON LEONARD
STREET LLP
1299 Farnam St.
Suite 1500
Omaha, NE 68102

MARK J. PETERSON
PETERSON LAW
OFFICE, LLC
5201 Chicago Street
Omaha, NE 68132

PATRICIA A. ZIEG
PATRICIA A. ZIEG LAW
OFFICES, LLC
1327 South 35th Ave.
OMAHA, NE 68105

Counsel for Omaha Tribal Council Respondents

December 16, 2015